In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 541

REUBEN L. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Middle District of Tennessee on two counts of concealing and selling a stolen motor vehicle transported in interstate commerce in violation of 28 U.S.C. 2313, and was sentenced to one and one-half years on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. B).

The judgment of the court of appeals was entered on June 22, 1967. On July 22, 1967, Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 21, 1967. However, the petition was not filed until August 28, 1967, and it is therefore out of time under Rule 22(2) of the Rules of this

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Court. In any event, petitioner presents no issue warranting review by this Court. His sole contention is that certain comments of the trial judge constituted reversible error; considered in the context of the three-day trial during which they were uttered, the comments in question—none of which was objected to at trial by petitioner's counsel—did not require reversal of the conviction.

The first four comments quoted in the petition (Pet. 4–6) were made while government witnesses were proving the chain of title of the stolen vehicle (G.A. 1b–10b).[1] The testimony on this point was somewhat involved, since early in the chain a clerical error had been made in transferring the vehicle identification number from the automobile to the title papers. The remarks of the trial judge were directed simply at clarifying this rather complicated testimony for the jury. The court was not aligning itself with the government when it suggested that the Assistant United States Attorney had better quit and start again in the morning. The witness on the stand was discovered to have been testifying from the wrong papers. The suggestion was made for the purpose of allowing the witness to procure the correct documents so that the government's evidence could be presented to the jury in a clear and concise manner.

The other remarks (Pet. 11–12) were made during direct examination of a government witness, William Poole. Although he had testified before the grand

[1] "G.A." refers to the appendix of the government's brief in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

jury approximately one year before, at trial he professed inability to recall any of the facts. Even reading the grand jury testimony failed to refresh his recollection. In these circumstances, the court was justified in permitting the government to treat Poole as a hostile witness (Pet. 7, 12). Poole's answers also warranted the court's comment that his memory was bad—a fact readily apparent to the jury. We note, finally, that the judge admonished the jury not to consider any statement made by him as reflecting his opinion on guilt or innocence (Pet. App. 3).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

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